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Delta H. Lewis v. C. A. Savage et al : Brief of Appellant

Utah Supreme Court

Charles P. Olson; John H. Jardine; Maury, Shone & Sullivan; Attorneys for Plaintiff and Appellant;

In the Supreme Court of the State of Utah

DELTA H. LEWIS,
Plaintiff and Appellant,
vs.
C. A. SAVAGE, KENNETH C. SAVAGE, C. A. SAVAGE doing business as SAVAGE COAL AND TIMBER COMPANY and SAVAGE COAL AND TIMBER COMPANY,
Defendant and Respondent

BRIEF OF APPELLANT

Appeal No. 8733

Appeal from the District Court of the Fourth Judicial District of the State of Utah
In and for the County of Utah

Honorable R. L. Tuckett, Judge

CHARLES P. OLSON
Thatcher Building
Logan, Utah
JOHN H. JARDINE
Whitehall, Montana
MAURY, SHONE & SULLIVAN
Hirbour Building
Butte, Montana
Attorneys for Plaintiff and Appellant

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STATEMENT OF FACTS

This suit is for personal injuries sustained by plaintiff in a collision between her husband's car, which he was driving, with the rear end of defendants' truck standing still between Oak Street and Alemeda Road on the Main North-South Highway in the City of Alameda in Idaho, at early dawn on August 2nd, 1955.

Because of a city ordinance of Alameda, set out in the complaint and admitted by stipulation to be in force at the time, against parking trucks on said highway between Oak Street and Alameda Road, defendants amended their Answer at the trial over plaintiff's objection to evade an admission in the first Answer that they were

parked at the time of the collision at the forbidden place.

Mr. Aadnesen for defendants, asked defendant, Kenneth Savage on the stand, "In relation to the place where your truck was *parked,* was there any street lamps in the area?" (Our italics) 126 R 3. Kenneth Savage says it was 15 or 20 minutes from the time he first stopped until he felt the impact.

Patrolman Wharton showed up on the job immediately after the accident. Testimony of C. A. Savage. 113 R 1.

Wharton had seen the truck standing there earlier that morning. 44 R 16. He did not observe anybody in movement around the truck. 44 R 27. A street light was in front close to the truck. 126 R 5.

Wharton, after first seeing the standing truck, in order for him and the court to fairly estimate the time it stood there before the second time he saw it, relates the things he did. Among them talking 15 or 20 minutes to the sergeant in the station, using the toilet, etc. convincing that 30 minutes would have elapsed from when the truck first was seen by Wharton until the collision. 56 R 17.

Lewis says to Savage at the scene, "And I asked him if he - if he had been *asleep,* there and he told me they had pulled up to stop and rest a few minutes." 17 R 28. This conversation is not denied by either defendant when on the stand.

When Kenneth Savage pulled up there he pushed his headlights "down on park". 136 R 23. Therefore, we say the evidence does not just strongly preponderate that defendants car was "parked". The proof is that it was parked.

The Alameda City Ordinance governing parking at night on the main highway where the collision occurred was partly alleged in the complaint, Ordinance No. 280, adopted February 20, 1952.

> "1. Unlawful to park any vehicle on Yellowstone Avenue (Highway 91-191) between one o'clock A. M. and six o'clock A. M. between Oak Street and Alameda Road."

By stipulation filed of counsel for plaintiff and defendants, it was admitted that this Ordinance was in existence at the time. "But by this stipulation the defendants do not in any manner waive any objection to the application of any ordinance of any nature to the above entitled matter, nor that the violation of such ordinance, if any, represented any evidence of negligence." Kenneth Wharton testified that the truck was stopped between Oak Street and Alameda Road on Yellowstone Highway. 49 R pointing to map. Lewis says he arrived in Alameda at approximately quarter to five in the morning. 11 R 14.

Paragraph 5 of the Complaint is:

"That the main highway upon which defendants truck was parked, and said Yellowstone Avenue (Highway 91-191) are one and the same street,

and the said truck was parked within the said City of Alameda."

From the original Answer (before amendment over objection), "Defendants admit Paragraphs 1, 2 and 5 and deny paragraphs 3, 4, 6 and 7."

There is no evidence at all in the record that Lewis, plaintiff, was driving at any rapid or negligent speed. Any evidence about it is to the contrary. "Did Lewis tell you, that in his opinion, he was under the speed limit at that time? He said he thought he was not exceeding the speed limit." (Officer Wharton) 76 R 5. "The speed limit was 35 miles per hour." 76 R 12.

Lewis was moving in the slow lane. Above and close to, and in front of the truck with lumber lengthening the obstacle, was a street light: meeting him just before the collision were the lights of another car, to the rear of this was the oncoming lights of the "milk truck." There were no flares out behind the truck, though it was on a main arterial highway from Salt Lake City to Butte, with traffic even at that hour, somewhat heavy, on the main street of two cities, to appearances only one comparatively large city, with ordinance that forbade parking where they stopped.

The plaintiff was more grievously injured than the learned trial judge found. As it is not the practice of appellate courts to assess damages on reversal in cases of this character we do not specify wherein the finding does not measure up to the undisputed evidence

of life enduring injuries.

The defendants were conscious of a dangerous load, the lumber behind the body of the truck. They had placed half-way up the load ten inch red flags at each corner. 123 R 5. They had flares in the truck, 123 R 21. When they stopped, they did not put out any flares, 123 R 19. The flares were of the reflector type. 123 R 26. "The type you sit on a little pedestal". 123 R 28.

"Mr. Aadnesen Q: Now would you describe what traffic you saw in that period of time when you were *parked?*" (We underscore; Mr. Aadnesen's spoken English is faultless).

A. "There was a few, very few cars went by, but you don't pay much attention to them because they are going by." 129 R 21.

STATEMENT OF POINTS

1. That the District Court erred in dismissing plaintiff's complaint, no cause of action.

2. That the evidence is insufficient to support the finding of the Court Number 3 that the plaintiff's husban was operating his vehicle at an excessive rate of speed in view of the circumstances and failed to keep a proper lookout for other objects on the highway and that such negligence was the sole proximate cause of the plaintiff's injuries and damages and that said finding is erroneous.

3. That the evidence is insufficient to support the finding of the Court Number 4 that defendants were not guilty of any negligence which was a proximate cause of plaintiff's injuries and damages and that said finding is erroneous.

4. The findings and conclusions are insufficient to support the judgment.

5. The District Court inproperly failed and refused to make findings of fact on all material issues, as follows:

(a) As to the existence of Alemeda City Ordinance No. 280;

(b) As to the applicability of said ordinance to defendants' conduct and as to defendants' violation of it;

(c) As to the issue of defendants' negligence.

6. The District Court improperly failed and refused to state its conclusions on the forfegoing issues of fact.

7. Plaintiff's (Appellant's) Motion for a new trial or in the alternative, for the Court to amend findings, conclusions and to enter a new judgment should have been granted.

ARGUMENT

The prime, perhaps only serious, question before the Supreme Court is whether there can be in law two proximate causes each attributable to different actors.

In failing to find whether or not defendants were

guilty of negligence and in finding *one proximate* cause in the acts of Lewis, found we think erroneously, to be negligent, the learned judge though he had covered the case sufficiently to compel a judgment in favor of the defendants. His failure to find anything about the conduct of the defendants, is as convincing as his finding of fact and conclusion of law to like effect, that he believed in the intervening sole cause doctrine. This was followed in some earlier cases. It is not the accepted rule nowadays.

All of the statement of points may be discussed under two separate arguments, each of which points up the error committed by the District Court in finding only one proximate cause. The two phases of arguments are:

1. The Defendants' Negligence.

2. The Proximate Cause

1. The Defendants' Negligence

The existence of the Alemeda City Ordinance prohibiting parking on the main highway during the night cannot be denied. It is partially pleaded in the complaint, and set out in full in the stipulation on file herein. 20 R.

"SECTION I. It shall be unlawful for any motor vehicle or other vehicles to be parked on the following streets within the City of Alemeda between the hours of 1 o'clock a.m. and 6 o'clock a.m., to-wit: On Yellowstone Avenue from Oak Street and North to Alemeda Road".

As to the violations of this ordinance by the defendants, the defendants' answer admitted that the truck was parked at the time of the collision at the forbidden place.

Courts take Judicial notice of statement of facts in prior pleadings in the same case, and they are evidence against parties making them. 20 Am. Jur., Evidence, Section 86, Page 104; *Johnson vs. Butte & Superior Copper Co.,* 41 Mont. 158, 108 Pac., 1057.

Though by amendment admittances are changed to denials, the statement in any pleading in the same case in code states are probative and remain matters of Judicial Notice. 20 Am Jur., Evidence, Section 86, Page 104.

Likewise, counsel for the defendants referred to the defendants as being parked. 126 R 3.

"The term "parking" as applied to automobiles, includes not only the voluntary act of leaving a car on the street unattended, but also the stopping of a car on a highway, though occupied and attended, for a length of time inconsistent with a reasonable use of the street for the purpose of travel, but does not generally inclued stopping at the curb for the purpose of taking in, or letting out, persons, or for the purpose of loading or unloading goods." 5 Am. Jur., Automobiles, Sec. 334, P. 682.

One of the defendants testified that it was 15 or 20

minutes from the time the truck was first stopped until the impact was first felt. 126 R. 3. Patrolman Wharton testified as to all of the things he did from the time he first observed the truck stopped until the time he was notified the accident had occured. These facts are related in the findings of fact, and are found at page 56 of the record. He estimated that 30 minutes had elapsed. 56 R. 17.

The accumulation of uncontradicted evidence here amounts to proof: (a) That the defendants were guilty of breach of the ordinance, and reasonable men cannot differ on that. The evidence is so strong (b) That the defendant were guilty of common law negligence, that plaintiff has not had a full fair trial until there is a finding on that question.

As to (a) we submit that a negative finding if it had been made would be set aside by this Court without hesitation on a reading of the testimony.

As to (b) after consideration of the evidence, we believe a negative finding if it had been made, would be held erroneous, and in view of the uncontradicted evidence, exceeding even the wide discretion of the trial presiding judge.

This Court knows that it did not take more than 3 or 4 minutes to tighten four chains and kick the tires (if that happened; they said nothing to Lewis about that, dum fervet opus).

The sanctity accorded the verdict of a jury on conflicting evidence is not present here. We submit that this record is such that this Court can judge the weight of the evidence and the credibility of witnesses as well as the presiding judge who saw and heard them. We submit, that when the Court has read this record there will be a feeling to a moral certainty and beyond any reasonable doubt that the defendants were guilty of negligent breach of the ordinance: that the evidence sternly preponderates, that they were guilty of common law negligence, by parking, or stopping for an unreasonable length of time on a main arterial paved highway, behind a raised light, without putting out flares, (See annotation at 111 ALR 1516 as to this failure alone being negligence) with lumber extending 3 ft. 5 in. behind and above their small rear lights; when a short distance in sight, in front, was a byway on which, if there was any need to stop, they could and should have placed their vehicle; when they observed cars going by; and must have observed car lights meeting them which would blind the vision of drivers of cars overtaking them; when by hanging red flags on the rear, they told of their consciousness that their load was of more than ordinary danger to traffic going in the same direction. (The only extenuating circumstance is that officer Wharton when he saw the truck standing there a half hour before the disaster, and nobody moving around it should have made them move on. This in law and, in fact, is no excuse.)

To find that such conduct was not negligent, we submit would be outside the broad discretion of the trial judge. When no finding at all was made about either phase of defendants' conduct, the only reason why some finding was not made was that the earnest learned judge believed that when he had found one proximate cause, his work was finished. It was all called to his attention by objection and motion to amend and supplement the findings. 26 R.

The Legislature of Utah has recognized that it is dangerous and negligent to leave occupied or unoccupied a vehicle stopped on a public highway when it can be readily removed for repairs off of traffic lanes. (Outside of cities) Section 41-6-101, UCA, 1953.

And that when any load extends 4 feet behind the body of the truck, at the time of night this disaster occurred a red lantern must be displayed so it will be observed 500 feet behind. (The defendants' load was within 7 inches of breach of statute, 50 R 13, within 7 inches of negligence per se) by Utah Statute for rural highways (Idaho Statute is presumed identical)

Section 41-6-128, U. C. A., 1953

Under similar statutes it seems to be unanimously classed by courts *also as negligence,* not to move off if it can easily be done.

Merback v. *Blanchard* (Wyo.) 105 Pac. 2d 272;
Rhoden v. *Peoria Creamery Co.,* 278 Ill. App. 452;

Watt v. *Associated Oil Co.* (Ore) 260 Pac. 1012; *Harkins* v. *Somerset Bus Co.* (Pa.) 162A 163; *Silvey* v. *Harm* (Cal.) 8 Pac. 2d 570.

The burden of proving that it is not possible to move a disabled vehicle out of traffic lanes is upon him who stops a motor car in a lane of traffic.

Certainly when many lawmakers have realized the carelessness of leaving a truck standing in lane of heavy traffic when a by-way is in sight close in front, intelligent jurors realize the same hazard and when such facts are not disputed a full fair trial requires the judge to make a finding about it if the case is tried without a jury.

The undisputed facts more than preponderate to the conclusion that the defendants were guilty of negligence and the trial court should have so found.

2. The Proximate Cause:

The trial Judge made a Finding, Conclusion and Decree that the negligence of the plaintiff's husband was the sole proximate cause of plaintiff's injuries and damages. The trial Court made no Finding concerning the defendants' negligence, and it is impossible to tell from the Findings of Fact and Conclusions of Law whether or not the trial Court was holding that the defendants were not negligent in any respect, or whether the defendants were negligent, but that their negligence was not a proximate cause of the damage to the plaintiff.

Rule 52 of the Utah Rules of Civil Proceedure provides that in non-jury cases the Court find the facts specially and state separately its conclusion thereon.

A long line of Utah cases, one of the latest being *Gaddis Investment Company* vs. *Morrison,* (1954), 3 U (2d) 43, 278 P (2d) 284, holds that failure to make Findings of Fact on all material issues is reversible error where it is prejudicial. Plaintiff feels that she has not had her day in Court in view of the trial Court's failure to make complete Findings and Conclusions, and strongly urges that this failure on the part of the trial Court alone is reversible error.

A review of the evidence establishes, in plaintiffs opinion, that there can be no doubt as to the defendants negligence. This point has been argued fully above.

This being so, it is apparent as indicated at the outset of the argument herein, that the trial Court must have felt that there could be only one proximate cause of an accident. A review of the authorities clearly establishes that there can be two proximate causes each attributable to different actors, with recovery being allowed to a damaged plaintiff against either or both of the actors.

The language of the Court in the case of *Kline* vs. *Moyer, et al* (1937), 325 Pa. 357, 191 A. 43, is pertinent. The Pennsylvania Supreme Court stated in its decision

> "Without discussing them at length, it is sufficient to note an almost continuous succession of recent cases in each of which an innocent passeng-

> er in an automobile was allowed to recover for injuries sustained as the result of a collision between the car in which plaintiff was riding and another vehicle negligently parked upon the highway, the recovery being either against the owner of the standing vehicle, or against both such owner and the negligent driver of plaintiff's car. In either event these decisions necessarily involved a conclusion that the negligence of the owner of the parked vehicle was in whole or part a proximate cause of the accident."

The Court then cites a series of cases to support its statement.

Further on, the same Court states,

> "We would formulate the general principle as follows: Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independant act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties".

This Pennsylvania decision is also found at 111 A. L. R. 406, and is followed by an annotation at page 412 where there is collected a number of cases from dif-

ferent jurisdiction involving an injury to a third person riding in one car which is involved in a collision with another vehicle negligently parked on the highway, in which said annotation the proximate cause is specifically emphasized.

The main paragraph in said annotation is stated as follows:

> "There are also numerous cases holding that negligence in leaving the automobile parked without light, or with insufficient light, may be regarded as the proximate cause, or a proximate cause, of injury immediately occasioned by the negligence, or at least the act, of the driver of another car in colliding with the parked automobile, the injuries being sustained in such cases usually by guests or occupants of the other car (Not chargeable with the driver's negligence)." (See discussion on this point of imputed negligence at page 17 of this brief.)

In our case, the driver of the vehicle in which the plaintiff was riding clearly did not become apprised of the dangerous situation created by the defendants vehicle being parked in the prohibited place until "a split second" before he ran into it, and when it was too late to avoid an accident. 14 R 19.

The time of the accident was just at dawn and the driver, of the vehicle in which the plaintiff was riding came from a narrow dark highway into a wider, lighted city street. A bright street light above and higher than the parked truck confronted him on his right front. Cars

with head-lights burning were approaching him from the left front and he swung over to the right to the outside lane for "slow" traffic. He was driving at a moderate rateof speed. 11 R., 12 R., 13 R., 14 R.

Judges, Supreme Court and District Court, own, ride in, drive automobiles. They know that visibility (excepting dust, rain and fog) is poorest, not at night, but at dusk and dawn. They have eyes. They know that bright lights ahead blind drivers until reached and passed. They know that small stationary lights do not attract attention so much as when in motion, and when between the driver's eye and a brighter, bigger light elevated, they give little, if any notice to an approaching driver. Judges know that in four lane highways the slow lanes are outside.

This Court has recognized for a number of years that more than one separate act of negligence, even though they do not happen simultaneously, may be proximate causes of an injury.

H*illyard* vs. *Utah By-Products Company,* (1953), (Utah) 263 P. (2d) 287.

In the Hillyard case, this Court quotes from Professor Bohlen, as follows:

> "The earlier of the two wrongdoers, even though his wrong has merely set the stage on which the later wrongdoer acts to the plaintiff's injury, is in most jurisdiction no longer relieved from responsibility merely because the later act of the

> other wrongdoer has been a means by which his own misconduct was made harmful. The test has come to be whether the later act, which realized the harmful potentialities of the situation created by the defendant, was itself foreseeable."

This Court went on to pronounce its own doctrine, as follows, (page 291)

> "The doctrine enunciated in the above quotations is based upon the proposition that one cannot excuse himself from liability arising from his negligent acts merely because the later negligence of another concurs to cause an injury, if the later act was a *legally foreseeable* event. This has also frequently been announced as the law by various courts.

The Hillyard case is also authority for the proposition that "the parking of a vehicle upon the paved or traveled portion of a highway is generally regarded as a hazard to traffic thereon".

The negligence, if any, of plaintiff's husband was not imputable to her. 59 A. L. R. 153, Annotation, Negligence of One Spouse as Imputed to Other Because of Marital Relationship Itself, supplemented in 110 A. L. R. 1099, citing the Utah case of Jackson vs. Utah Rapid Transit Co., (1930) 77 Utah 21, 290 Pac. 970, in support of the general rule that the negligence of a husband will not, merely because of the marital relationship, be imputed to the wife in an action brought to recover for personal injuries sustained by her. See also 90 A. L. R. 630, Annotation, Negligence of Driver of Automobile

as Imputable to Passenger, supplemented in 123 A. L. R. 1171. The same rule is stated in 5 Am .Jur., Automobiles, Sec. 498, p. 784.

The laws of Idaho are presumed to be the same as the laws of Utah, in the absence of proof to the contrary, and the courts will not take judicial notice of foreign law.

> *Dickson* vs. *Mullings,* et al, 66 Utah 282, 241 Pac. 840;
>
> *United Air Lines Trans. Corp.* vs. *Industrial Comm.,* 107 Utah 52; 151 P (2d) 591;
>
> *Whitmore Oxygen Co.* vs. *Utah State Tax Commsision,* 114 Utah 1, 196 P (2d) 976;
>
> *Toomer's Estate* vs. *Union Pac. Ry. Co.,* (Utah) 239 P (2d) 162 at 171.

The California cases which impute negligence from one spouse to the other were based on the fact or law that in California there is community property and that as the husband would be the owner of half of any recovery he would not be allowed to profit by his own contributory negligence. But this rule does not apply in the present case because: (1) There is no showing that Idaho is a community property State; and (2) Such a rule does not apply even in a community property state when the husband and wife are residents of a place which does not have community property, such as Montana. *Bruton* vs. *Villoria,* (Cal., 1956) 292 P. (2d) 638. The proof is that plaintiff and her husband were residents of

Montana, that the husband owned the car, that plaintiff had no interest in it nor any control over it.

CONCLUSION

In conclusion, it is respectfully submitted that the present status of the law, recognized by this Court, is that more than one separate act of negligence may be proximate causes of injuries and damages to an innocent party, with recovery being allowed against either or both of the actors. Such being the status of the law, the judgement of the District Court should be reversed and the cause remanded with direction to the District Court to assess damages in plaintiff's favor.

Respectfully Submitted,
CHARLES P. OLSON,
JOHN H. JARDINE,
MAURY, SHONE & SULLIVAN
Attorneys for Plaintiff and Appellant